INTERNATIONAL COURT OF JUSTICE

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)

Written observations of the Republic of the Union of Myanmar on the admissibility of the declarations of intervention in the case

26 March 2024

A. Introduction

1. Pursuant to the decision of the Court communicated to the Parties on 24 January 2024, the Republic of the Union of Myanmar submits the present written observations on the admissibility of:

   a. the declaration of intervention in the proceedings pursuant to Article 63 of the Statute filed by the Republic of Maldives on 15 November 2023 (the "**Maldives Declaration**"); and

   b. the joint declaration of intervention in the proceedings pursuant to Article 63 of the Statute filed by Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland on 15 November 2023 (the "**Joint Declaration**").

2. For the reasons set out below, Myanmar maintains its position that both the Maldives Declaration and the Joint Declaration are inadmissible.

B. Procedural background

3. By an Order of 16 October 2023, the Court fixed 16 May 2024 as the time-limit for the filing of the Reply of The Gambia, and 16 December 2024 as the time-limit for the filing of the Rejoinder of Myanmar.

4. On 15 November 2023, the Maldives filed in the Registry the Maldives Declaration, declaring its desire to avail itself of the right of intervention conferred by Article 63 of the Statute.

5. On the same date, 15 November 2023, Canada, Denmark, France, Germany, the Netherlands and the United Kingdom filed the Joint Declaration, declaring their desire to avail themselves of the right of intervention conferred by Article 63 of the Statute.

6. On 15 January 2024, Myanmar furnished its written observations on the Maldives Declaration and the Joint Declaration, objecting to the admissibility of both declarations of intervention (the "**January 2024 Myanmar Observations**").

7. On 16 January 2024, The Gambia conveyed its written observations on the Maldives Declaration and the Joint Declaration.

8. On 24 January 2024, the Registrar informed the Parties that in light of the fact that Myanmar objects to the admissibility of the declarations of intervention, the Court is required by Article 84(2) of the Rules of Court to hear the States seeking to intervene and the Parties before deciding on the question of admissibility, and that the Court has chosen to do so by means of a written procedure. The Parties were further informed that the Court had fixed 26 February 2024 as the time-limit for the States seeking to intervene to submit observations in writing on the admissibility of their declarations, and 26 March 2024 as the time-limit for the Parties to submit observations in writing on the admissibility of those declarations.

9. Pursuant to that decision of the Court:

   a. on 21 February 2024, the Maldives filed observations in writing on the admissibility of the Maldives Declaration (the "**Maldives Observations**");

   b. on 26 February 2024, Canada, Denmark, France, Germany, the Netherlands, and the United Kingdom filed joint observations on the admissibility of the Joint Declaration (the "**Joint Observations**"); and

   c. Myanmar now files the present written observations on the admissibility of the Maldives Declaration and the Joint Declaration.

C. Relevant provisions of the Statute and Rules of Court

10. Article 63 of the Statute provides:

> 1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.
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> 2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

11. Article 82 of the Rules of Court provides, in relevant part:

> 1. A State which desires to avail itself of the right of intervention conferred upon it by Article 63 of the Statute shall file a declaration to that effect, signed in the manner provided for in Article 38, paragraph 3, of these Rules. ...

2. The declaration shall state the name of an agent. It shall specify the case and the convention to which it relates and shall contain:
   (a) particulars of the basis on which the declarant State considers itself a party to the convention;
   (b) identification of the particular provisions of the convention the construction of which it considers to be in question;
   (c) a statement of the construction of those provisions for which it contends;
   (d) a list of the documents in support, which documents shall be attached.

12. Myanmar does not dispute the following.

    a. Article 63 of the Statute confers a *right* of intervention on States which are parties to a convention the construction of which is in question in the case. Unlike in the case of intervention under Article 62 of the Statute,[1] intervention by a State under Article 63 does not require the grant of permission by the Court.

    b. Unlike in the case of intervention under Article 62 of the Statute, a State, in order to exercise the right of intervention under Article 63 of the Statute, is not required to demonstrate that it has an interest of a legal nature which may be affected by the decision in the case.

13. Nevertheless, the right of intervention under Article 63 of the Statute is subject to limitations. Furthermore, a State which desires to avail itself of the right of intervention conferred by Article 63 must do so in accordance with the procedural requirements in Article 82 of the Rules of Court.[2] A purported exercise of the right of intervention under Article 63 of the Statute which exceeds the limitations of that right, or which is not in accordance with the procedural requirements in Article 82 of the Rules of Court, is inadmissible.

D. The requirements of admissibility

14. Until 2022, interventions under Article 63 of the Statute were very rare.

15. There was only ever one declaration of intervention under the materially identical Article 63 of the Statute of the Permanent Court of International Justice. In the case of the *S.S. Wimbledon*,[3] an intervention by Poland under this provision was admitted on the basis that Poland was a party to the Treaty of Versailles, the construction of which was in question in the case. The admissibility of the declaration of intervention was not

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1 Article 62 of the Statute provides as follows: "1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. 2 It shall be for the Court to decide upon this request.".

2 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Order*, 5 June 2023 (the "***Ukraine v. Russia* Order**"), para. 28 and the earlier case law there cited.

3 *S.S. "Wimbledon", Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 15 (Judgment of 17 August 1923).

disputed by the parties, and the Court's judgment admitting the intervention did not give details of how each of the requirements of admissibility were met.[4]

16. Between 1945 and 2021, declarations of intervention under Article 63 of the Statute were filed before this Court in only four cases, and were found to be admissible in only two of these: the *Haya de la Torre* case in 1951,[5] and the *Whaling in the Antarctic* case in 2013.[6]

17. In the *Haya de la Torre* case, the Court admitted an intervention by Cuba under Article 63 of the Statute in a case brought by Colombia against Peru, on the basis that Cuba was a party to the 1928 Havana Convention on Asylum, the construction of which was in question in the case. Certain limitations on the right of intervention under Article 63 of the Statute were made clear in that case. In particular, the Court found that Cuba could not address questions that were already *res judicata* as a result of the Court's earlier judgment in the *Asylum* case.[7] The Court said:

> [E]very intervention is incidental to the proceedings in a case; it follows that a declaration filed as an intervention only acquires that character, in law, if it actually relates to the subject-matter of the pending proceedings. The subject-matter of the present case differs from that of the case which was terminated by the Judgment of November 20th, 1950 [in the *Asylum* case] ...
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> [T]he Memorandum attached to the Declaration of Intervention of the Government of Cuba is devoted almost entirely to a discussion of the questions which the Judgment of November 20th, 1950 [in the *Asylum* case], had already decided with the authority of *res judicata*, and that, to that extent, it does not satisfy the conditions of a genuine intervention. However, at the public hearing on May 15th, 1951, the Agent of the Government of Cuba stated that the intervention was based on the fact that the Court was required to interpret a new aspect of the Havana Convention, an aspect which the Court had not been called on to consider in its Judgment of November 20th, 1950.
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> Reduced in this way, and operating within these limits, the intervention of the Government of Cuba conformed to the conditions of Article 63 of the Statute.[8]

18. In the *Asylum* case, the 1928 Havana Convention on Asylum had also been in question. Cuba was neither a party nor an intervener in the *Asylum* case, and was therefore not bound by the judgment in that case. Despite this, the Court, in the passage quoted

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4 *Ibid.*, pp. 11-14 (Question of Intervention by Poland, Judgment of 28 June 1923).

5 *Haya de la Torre Case, Judgment of June 13th, 1951, I.C.J. Reports 1951*, p. 71 ("***Haya de la Torre* case").

6 *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013*, p. 3 ("***Whaling in the Antarctic* Order").

7 *Colombian-Peruvian asylum case, Judgment of November 20th 1950, I.C.J. Reports 1950*, p. 266 ("***Asylum* case"); *Request for interpretation of the Judgment of November 20th, 1950, in the asylum case, Judgment of November 27th, 1950, I.C.J. Reports 1950*, p. 395.

8 *Haya de la Torre* case, pp. 76-77.

above, found that in the *Haya de la Torre* case, Cuba could intervene only in relation to the questions of construction of that convention that were actually in question in that latter case. The specific point of construction of the convention in question in the *Haya de la Torre* case was whether the convention imposed an obligation to surrender a refugee in a case where asylum had been granted to him contrary to the provisions of that convention.[9] The Court said that "In these circumstances, the only point which it is necessary to ascertain is whether the object of the intervention of the Government of Cuba is in fact the interpretation of the Havana Convention in regard to the question whether Colombia is under an obligation to surrender the refugee to the Peruvian authorities".[10]

19. The *Haya de la Torre* case thus establishes that an intervention under Article 63 of the Statute must address the specific questions of construction that are actually raised by the parties in their dispute. An intervener under Article 63 is not at liberty to introduce into the case additional questions of construction of the convention that have not been so raised.

20. In the *Whaling in the Antarctic* case, the Court decided that an intervention by New Zealand under Article 63 of the Statute was admissible in a case brought by Australia against Japan, on the basis that New Zealand was a party to the International Convention for the Regulation of Whaling, the construction of which was in question in the case. The Court was evidently influenced in its decision to admit the intervention by the fact that neither party had objected to it.[11] Nevertheless, despite the fact that neither party had objected, the Court still made clear that "the fact that intervention under Article 63 of the Statute is of right is not sufficient for the submission of a 'declaration' to that end to confer *ipso facto* on the declarant State the status of intervener".[12] Rather, the status of intervener is only conferred by an order of the Court admitting the intervention, after the Court has satisfied itself that all requirements of admissibility are met.

21. The order made in the *Whaling in the Antarctic* case is significant in three particular respects.

22. First, the Court made clear that each and every requirement of Article 82 of the Rules of Court must be satisfied in order for a declaration of intervention under Article 63 of the Statute to be admissible.[13] The Court carefully considered each of the separate requirements in turn, and, in relation to each requirement, made an express finding that it was satisfied.[14]

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9 *Ibid.*, p. 80-81.

10 *Ibid.*, p. 77.

11 *Whaling in the Antarctic* Order, p. 9, para. 19 ("whereas, moreover, the Parties raised no objection to the admissibility of the Declaration …").

12 *Ibid.*, p. 5, para. 8.

13 *Ibid.*, pp. 5-8, paras. 8-15.

14 *Ibid.*

23. Second, the Court affirmed that an intervention under Article 63 of the Statute is strictly limited to the construction of the convention in question.

> [I]ntervention under Article 63 of the Statute is limited to submitting observations on the construction of the convention in question and does not allow the intervenor, which does not become a party to the proceedings, to deal with any other aspect of the case before the Court.[15]

24. In that case, New Zealand intervened on the question of whether Article VIII of the International Convention for the Regulation of Whaling enabled a State party to determine unilaterally whether a programme of whaling was for purposes of scientific research, or whether this had to be capable of being established on the basis of an objective assessment.[16] This very question of construction of this provision had been expressly raised in the Memorial of Australia,[17] to which New Zealand had access at the time of filing its declaration of intervention.[18]

25. Third, the Court noted that an intervention under Article 63 of the Statute cannot affect the equality of the parties to the dispute.[19]

26. In contrast to the *Haya de la Torre* case and *Whaling in the Antarctic* case, the Court declined to admit declarations of intervention under Article 63 in two other cases: the *Military and Paramilitary Activities* case in 1984,[20] and the *Request for an Examination of the Situation* in 1995.[21]

27. In the *Military and Paramilitary Activities* case, the Court decided that an intervention under Article 63 of the Statute by El Salvador was not admissible in a case brought by Nicaragua against the United States of America. This was because the Court had decided first to address the question of the jurisdiction of the Court to entertain the dispute, and because the questions on which El Salvador sought to intervene would only fall to be addressed if and when the Court were to decide that it had jurisdiction and that the application of Nicaragua was admissible. The Court thereby again affirmed that an intervention under Article 63 of the Statute can only address issues that are actually in dispute in the proceedings in question at the time that the application to intervene is filed.

28. In the *Request for an Examination of the Situation*, the Court dismissed interventions under Article 63 of the Statute by Samoa, the Solomon Islands, the Marshall Islands and the Federated States of Micronesia in proceedings brought by New Zealand against

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15 *Ibid.*, p. 9, para. 18. See also at p. 3, para. 7.

16 *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Declaration of Intervention of New Zealand, 20 November 2012, pp. 16-18, paras. 29 and 33, https://www.icj-cij.org/sites/default/files/case-related/148/17256.pdf.

17 *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Memorial of Australia, 9 May 2011, pp. 186-189, paras. 4.116 to 4.122, www.icj-cij.org/sites/default/files/case-related/148/17382.pdf.

18 *Whaling in the Antarctic* Order, p. 9, para. 22.

19 *Ibid.*, p. 9, para. 18.

20 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Declaration of Intervention, Order of 4 October 1984, I.C.J. Reports 1984*, p. 215.

21 *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, I.C.J. Reports 1995*, p. 288.

France, on the basis that the main proceedings themselves were dismissed at a preliminary stage.

29. Thus, in the century from 1922 to 2021, declarations of intervention under Article 63 of the Statute were filed in only five cases (an average of one case every 20 years), and the interventions were admitted in only three of those cases (an intervention by a single State in a case on average once every 33 years). Even then, the Court made clear that such interventions are subject to the limitations above.

30. Since July 2022, there has been a dramatic change in the use of Article 63 of the Statute. In the space of approximately one and a half years, there have now been declarations of intervention under Article 63 in two further cases, namely in the present case, as well as in *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* (***"Ukraine v. Russia"***). In *Ukraine v. Russia*, declarations of intervention under Article 63 were filed by 33 States in the preliminary objections phase, of which 32 were found by the Court to be admissible.[22] In the present case, declarations of intervention under Article 63 have been filed by a total of seven States. Together, that is an average in the last year and a half of some 27 declarations of intervention under Article 63 per year. This cannot be assumed to be a temporary anomaly. According to media reports, interventions under Article 63 of the Statute are also being contemplated by further States in other proceedings.[23]

31. It must be recognised that interventions under Article 63 of the Statute have significant effects on the parties. Such interventions will likely increase the amount of time that will be required before a case is finally concluded. Such interventions will furthermore impose additional costs and burdens on the parties, including by diverting resources that would otherwise be available to each party to address the arguments presented by the other party.

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22 See *Ukraine v. Russia* Order.

23 In relation to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, see for instance: L. Novo, "Five questions and answers about South Africa's case against Israel", *New Atlanticist*, 12 January 2024 ("So far, no state has filed a formal declaration to intervene in the case. However, on Tuesday, Belgian Deputy Prime Minister Petra De Sutter said she would encourage Belgium to officially support South Africa in the case"), https://www.atlanticcouncil.org/blogs/new-atlanticist/five-questions-and-answers-about-south-africas-genocide-case-against-israel/; Bangladesh, Ministry of Foreign Affairs, press release, "Bangladesh backs South Africa's ICJ move against violation by Israel in Gaza", 14 January 2024 ("Bangladesh welcomes the opportunity to file a declaration of intervention in the proceedings in due course"), https://mofa.gov.bd/site/press_release/2bd6b2da-c04d-48b7-a7c8-b32cf13a97fc; L. Schulten, "What is third-party intervention at the ICJ", *Deutsche Welle*, 19 January 2024 ("Last Friday, Germany announced it would intervene on Israel's behalf as a third party in the case"), https://www.dw.com/en/what-does-it-mean-if-a-third-party-intervenes-at-the-international-court-of-justice/a-68024168; United States of America, House of Representatives, House Committee on Foreign Affairs, press release, "Chairman McCaul Calls upon Biden Administration to Intervene in South Africa's Meritless Genocide Case Against Israel at ICJ", 5 March 2024 ("Today, House Foreign Affairs Committee Chairman Michael McCaul sent a letter to President Biden and Secretary of State Antony Blinken calling on the Biden administration to formally intervene in South Africa's case against Israel at the International Court of Justice alleging violations of the Genocide Convention"), https://foreignaffairs.house.gov/press-release/chairman-mccaul-calls-upon-biden-administration-to-intervene-in-south-africas-meritless-genocide-case-against-israel-at-icj/.

32. Interventions under Article 63 of the Statute may also impose challenges for the Court itself. About a half of the contentious cases presently pending before the Court involve alleged violations of multilateral treaties to which very large numbers of States are parties.[24] There is an obvious risk that the work of the Court could become unmanageable if significant numbers of cases were to have significant numbers of such interveners. There are presently over 150 Contracting Parties to the Genocide Convention, and, as *Ukraine v. Russia* has demonstrated, the prospect of very large numbers of those States intervening under Article 63 in a single case is not unrealistic.

33. An intervener under Article 63 of the Statute does not become a party to the case.[25] Nor is such an intervener a party to the dispute that the Court is called upon to settle. Nor will such an intervener normally even have an interest of a legal nature which may be affected by the decision of the Court. Such an intervener is a stranger to the litigation, and typically a stranger to the facts of the case and to the dispute. Even stricter compliance with the requirements of the Statute and Rules of Court must be expected of such a stranger to the litigation than would be expected of a party in the case.

34. Intervention under Article 63 of the Statute may well be a right. However, that right is subject to limitations, and the exercise of that right is subject to procedural requirements. Fairness to the parties as well as the good administration of justice demand that the requirements of admissibility of interventions under Article 63 of the Statute be rigorously observed.

35. Consistently with the case law of the Court to date, including the recent *Ukraine v. Russia* Order, an intervention under Article 63 of the Statute is subject to the following requirements of admissibility.

36. First, the subject matter of the intervention must be confined to questions of construction of the relevant provisions of the convention in question: "the right to intervene under Article 63 is confined to the point of interpretation which is in issue in

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[24] **(1)** Proceedings instituted by the Republic of Nicaragua against the Federal Republic of Germany on 1 March 2024 (Genocide Convention); **(2)** *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* (Genocide Convention); **(3)** *Aerial Incident of 8 January 2020 (Canada, Sweden, Ukraine and United Kingdom v. Islamic Republic of Iran)* (Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation); **(4)** *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic)* (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); **(5)** *Request relating to the Return of Property Confiscated in Criminal Proceedings (Equatorial Guinea v. France)* (United Nations Convention against Corruption); **(6)** *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* (Genocide Convention); **(7)** *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)* (International Convention on the Elimination of All Forms of Racial Discrimination); **(8)** *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)* (International Convention on the Elimination of All Forms of Racial Discrimination); **(9)** *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)* (Vienna Convention on Diplomatic Relations).

[25] See paragraph 23 above. See also footnotes 26 and 31 below and accompanying text.

the proceedings, and does not extend to general intervention in the case".[26] This means in particular the following.

a. An intervening State is not entitled to address or to refer to the merits of the case, and in particular, is not permitted to address matters such as the evidence in the case, the facts, or the application of the convention in the case at hand.[27] The Maldives does not appear to dispute this.[28]

b. Apart from the construction of the relevant provisions of the convention, the intervening State may not address the interpretation or application of any other norms of conventional or customary international law, or issues such as the rules of procedure or of evidence to be applied by the Court when determining the merits of the case.[29]

c. A declaration of intervention is not permitted to address matters that are irrelevant to the intervention. Article 82(2)(c) of the Rules of Court provides that a declaration of intervention under Article 63 of the Statute shall contain "a statement of the construction of [the relevant] provisions [of the convention] for which it contends". It does not allow for a declaration of intervention to address other matters. In particular, a declaration of intervention cannot include political statements, or statements concerning the motivations for the intervention, or statements of background facts, or statements supportive or critical of either of the parties.[30]

Thus, the Court has affirmed that "the *limited* object of the intervention is to allow a third State not party to the proceedings, but party to a convention whose construction is in question in those proceedings, to present to the Court its *observations on the construction of that convention*".[31]

37. Secondly, the subject matter of the intervention must be confined to such questions of construction of the provisions of the convention as are actually in dispute between the parties to the case. In relation to such a question in dispute between the parties, the intervener may contend for a construction of the provisions of the convention that is different to that contended for by either of the parties. However, interveners are not entitled to present observations on points of construction of the convention which are not in issue in the proceedings. Thus, for instance:

a. If the dispute between the parties concerns the construction of provision A of the convention, and there is no question raised by the parties in relation to the

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26 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application to Intervene, Judgment, I.C.J. Reports 1981* ("***Tunisia/Libya* Order**"), p. 15, para. 26, referring to *Haya de la Torre* case, pp. 74, 76-77; see also *Russia v. Ukraine* Order, para. 49 ("intervention under Article 63 of the Statute has a limited scope, since the intervening State can only submit observations on the construction of the convention in question and does not become a party to the proceedings").

27 *Ukraine v. Russia* Order, para. 84.

28 See Maldives Observations, paras. 22 and 24-25.

29 See *Ukraine v. Russia* Order, para. 84.

30 See, e.g., *Ukraine v. Russia* Order, para. 84 ("to the extent that some declarations also address other matters, such as the existence of a dispute between the Parties, the evidence, the facts or the application of the Convention in the present case, the Court will not consider them").

31 *Whaling in the Antarctic* Order, p. 5, para. 7 (emphasis added).

construction of provision B of the convention, then a State cannot intervene under Article 63 of the Statute to address the latter question.

b. If the dispute between the parties concerns the question whether circumstance X would fall within the scope of a particular provision of the convention, and there is no question raised by the parties in relation to whether circumstance Y would fall within the scope of that provision, then a State cannot intervene under Article 63 of the Statute to address the latter question.

c. If there is no dispute between the parties as to whether a particular provision of a convention has a particular effect, then the construction of that provision is not in question in the proceedings for purposes of Article 63(1) of the Statute. The mere fact that one party alleges that the other has violated that provision of the convention, and the other denies this, does not mean that the construction of that provision of the convention is in question in the case. The dispute between the parties may concern solely the facts of the case, rather than the construction of that provision of the convention.

38. These limitations flow from the nature of an intervention under Article 63 of the Statute, and from the nature of the judicial function of the Court itself.

a. The function of the Court is to "decide ... such disputes as are submitted to it" (Statute, Article 38(1)). That is to say, in its contentious jurisdiction, the function of the Court is to *decide disputes between the parties* to the case. It is the parties who determine what is in dispute between them. The Court's function is not to give advisory opinions on additional questions of interpretation of a convention raised by interveners under Article 63 of the Statute.

b. The jurisprudence of the Court acknowledges that "the right to intervene under Article 63 is confined to *the point of interpretation which is in issue in the proceedings*".[32]

c. It would be a cause of particular unfairness to the parties, and inconsistent with the equality of the parties, if a State which is not a party to the proceedings could in an intervention under Article 63 of the Statute introduce new issues in the case that the parties themselves have not put in question, thereby expanding the scope of the proceedings.

d. Article 82, paragraph 2, alinéa *(b)* of the Rules of Court requires a declaration of intervention to contain the "identification of the particular provisions of the convention the construction of which [the intervening State] considers to be in question", and alinéa *(c)* then requires the declaration of intervention to contain "a statement of the construction of *those* provisions" (emphasis added). No provision is made for the declaration of intervention to contain any statement dealing with matters other than the construction of those specific provisions of the convention the construction of which is in question in the case.

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32 *Tunisia/Libya* Order, p. 15, para. 26 (emphasis added), referring to *Haya de la Torre* case, *I.C.J. Reports 1951*, pp. 74, 76-77.

e. The Court's previous practice is consistent with these limitations: see paragraphs 17-28 above. The practice in *Ukraine v. Russia* is similarly consistent. The Court said in that case that "a State can intervene at the preliminary objections stage of the proceedings in respect of provisions that have a bearing on the question of the jurisdiction of the Court",[33] and that "If the construction of certain provisions is in question at the stage of the preliminary objections, States will be allowed to intervene at that stage to present their construction of those provisions".[34] The Court added that it "cannot take into consideration, at the preliminary objections stage, observations on the construction of provisions of a convention relating to the merits of the case",[35] and that "intervention under Article 63 of the Statute is limited to the construction of the provisions in question at the relevant stage of the proceedings".[36] In other words, interventions can address the construction of only those provisions of the convention that are in question in the proceedings at the time that the declaration of intervention is filed.[37]

f. In relation to the questions that an intervener under Article 63 of the Statute is entitled to address, the intervener may well be able to furnish the Court with a "wider range of information"[38] by presenting different arguments or by contending for a different construction to those presented or contended for by the parties. However, this does not mean that an intervener under Article 63 of the Statute should be entitled to address questions other than those that the parties have put in question in the proceedings.

g. The fact that a proposed intervener will normally be supplied with copies of the pleadings in a case only after an intervention has been admitted (Article 86(1) of the Rules of Court), and will therefore not at the stage of filing a declaration of intervention have a detailed knowledge of the various arguments advanced by the respective parties,[39] is not a reason for affording additional liberties to a proposed intervener. A proposed intervener will normally know from the application instituting proceedings if a particular point of construction of a convention is being advanced by an applicant. Furthermore, a State can file a declaration of intervention in relation to a point of construction of a provision of a convention, even if it is not certain whether or not this particular point of construction is in

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33 *Ukraine v. Russia* Order, para. 63.

34 *Ibid.*, para. 68.

35 *Ibid.*, para. 74.

36 *Ibid.*, para. 84.

37 The Maldives Observations, para. 29, refer to the *Ukraine v. Russia* Order, para. 45, in which the Court said that "while many of the declarant States express similar views on the construction of the provisions of the Genocide Convention, which are close to the views of Ukraine, this does not constitute a reason to find that the declarations are inadmissible, since, under the Rules of Court, each State may identify the provisions of the convention the construction of which it considers to be in question and set out its position thereon". The Maldives Observations argue that the Court thereby found that an intervener under Article 63 of the Statute can raise new and different points of interpretation. That is not what the Court said in this passage. In this passage, the Court was rejecting an argument that "the real object of the interventions is not the construction of the Genocide Convention but the pursuit by the declarant States of a joint case with Ukraine, such that they become *de facto* co-applicants" (*Ukraine v. Russia* Order, para. 42). The Court was saying that it was irrelevant that many of the declarant States expressed similar views to those of Ukraine, since that was their choice.

38 Maldives Observations, paras. 29 and 33.

39 *Ibid.*, para. 30.

question in the case (see the wording of Article 82(2)(b) of the Rules of Court). However, the Court will only admit the intervention if the Court *is* satisfied that that point of construction *is* in fact in question in the case.

39. Thirdly, the declaration of admissibility must comply with all the procedural requirements in Article 82 of the Rules of Court.[40] The Maldives does not appear to dispute this.[41]

40. In *Ukraine v. Russia*, the Court found that some of the declarations of intervention went beyond the permissible scope of an intervention, by addressing "other matters, such as the existence of a dispute between the Parties, the evidence, the facts or the application of the Convention in the present case".[42] The Court said that it would simply not consider those other matters.[43] That amounted to a decision by the Court that the parts of the declarations containing these other matters were inadmissible. Thus, the Court said that "the declarations of intervention are admissible at the current stage *in so far as* they concern the construction of the provisions relating to its jurisdiction".[44] In the *dispositif* of its Order in that case, the Court decided that 32 declarations of intervention were admissible "*in so far as* they concern the construction of Article IX and other provisions of the Convention on the Prevention and Punishment of the Crime of Genocide that are relevant for the determination of the jurisdiction of the Court".[45] The Court thereby affirmed that it is able to find that parts of a declaration of intervention are inadmissible.

41. Where the whole, or a significant portion, of a declaration of intervention contains impermissible matters, it may be appropriate for the Court to find that the declaration of intervention as a whole is inadmissible. Where only specific parts of a declaration of intervention contain impermissible matters, it may be appropriate for the Court to find that only those specific parts are inadmissible. The Court could also request an intervener to refile the declaration of intervention without those impermissible parts. The Court could additionally make clear that if the intervention is admitted, none of the impermissible parts may be included in that State's written observations on the subject-matter of the intervention under Article 86(1) of the Rules of Court, or in any observations by that State in the oral proceedings under Article 86(2) of the Rules of Court.

42. It must be borne in mind that even where impermissible portions of a declaration of intervention are ignored by the Court, they will nonetheless be made public on the Court's website, and will attract media attention. It would be contrary to the good administration of justice for interveners to be able to use the Article 63 procedure for purposes other than those for which that procedure is provided, for instance, by seeking to make statements before the Court which go beyond the permissible limits of such an intervention, or by seeking to obtain decisions by the Court on issues that have not been

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40 See paragraph 22 above; *Ukraine v. Russia* Order, paras. 28 (and the earlier cases there cited) and 33-40.

41 Maldives Declaration, para. 7.

42 *Ukraine v. Russia* Order, para. 84 ("to the extent that some declarations also address other matters … the Court will not consider them").

43 *Ibid.*

44 *Ibid.*, para. 75 (emphasis added).

45 *Ibid.*, para. 102(1) (emphasis added).

raised by the parties in the case, or by seeking publicity for themselves or for unrelated issues.[46]

43. It is therefore more consistent with the good administration of justice for the Court formally to declare parts of a declaration of intervention containing such impermissible matters to be inadmissible than for the Court simply not to consider those parts. Formal findings of the Court that parts of a declaration of intervention are inadmissible will make this clear, and will provide guidance for practice in future cases. A mere statement that the Court "will not consider" other matters creates uncertainty and puts the parties at a disadvantage, as one or both parties may feel compelled to address these other matters anyway as they have been raised and made public. This will require parties to expend additional resources unnecessarily and thus is contrary to the good administration of justice.

44. In *Ukraine v. Russia*, the Court furthermore affirmed that "It is incumbent on the Court to organize the proceedings in a manner which ensures the equality of the parties and the good administration of justice".[47] In that case, the Court was satisfied that it was able to organize proceedings in such a way. It was furthermore satisfied that "admitting the declarations of intervention in the present case would not infringe the principles of equality of the parties or the good administration of justice".[48] That was a conclusion expressed in relation to the particular circumstances of that specific case. The Court did not say that an intervention under Article 63 of the Statute could never be capable of infringing the principles of equality of the parties or the good administration of justice, or that an otherwise admissible intervention would necessarily be admissible if it did.[49]

E. The Maldives Declaration is inadmissible

1. The Maldives Declaration does not comply with Article 82(1) of the Rules of Court

45. The Maldives Declaration of 15 November 2023 does not satisfy the requirements of admissibility since, apart from anything else, it does not comply with Article 82(1) of the Rules of Court.

46. Article 82(1) of the Rules of Court provides that a declaration of intervention under Article 63 of the Statute shall be "signed in the manner provided for in Article 38, paragraph 3, of these Rules".

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46 The January 2024 Myanmar Observations, para. 25, noted that the Maldives issued a press release when it filed its declaration of intervention, alleging violations of human rights by Myanmar. It is not suggested that the issuing of this press release of itself rendered the Joint Declaration inadmissible. However, it shows how the procedures of the Court can be used by interveners to gain publicity for positions that are outside the scope of a permissible intervention.

47 *Ukraine v. Russia* Order, para. 52.

48 *Ibid.*, para. 53.

49 In this respect, see also *Whaling in the Antarctic* Order, p. 9, para. 18.

47. Article 38(3) of the Rules of Court in turn provides for signature in the following manner:

> The original ... shall be signed either by the agent of the party submitting it, or by the diplomatic representative of that party in the country in which the Court has its seat, or by some other duly authorized person. If the application bears the signature of someone other than such diplomatic representative, the signature must be authenticated by the latter or by the competent authority of the applicant's foreign ministry.

48. The Maldives Declaration of 15 November 2023 does not comply with this requirement for the following reasons.

49. The person signing the Maldives Declaration as Agent of the Maldives was not the diplomatic representative of the Maldives in the country in which the Court has its seat. Rather, it was signed by the Attorney-General of the Republic of Maldives.

50. That being the case, Article 82(1) read with Article 38(3) of the Rules of Court required the Agent's signature to be authenticated by such diplomatic representative or by the foreign ministry of the Maldives. However, the signature was not so authenticated.

51. The Maldives Observations contend that the Court should overlook this non-compliance by the Maldives. The position of Myanmar is that strict compliance with Article 82 of the Rules of Court must be required (see paragraphs 22, 31-34 and 39 above).

52. Contrary to what the Maldives claims,[50] the Court did not in *Ukraine v. Russia* overlook instances of non-compliance with Article 82 of the Rules of Court by Austria and Lithuania. Rather, the Court found that Austria and Lithuania had in fact in substance complied with Article 82(2)(d) of the Rules of Court, which requires a declaration of intervention to contain "a list of the documents in support, which documents shall be attached".[51] This was because both declarations of intervention made clear what documents were being relied on in support, and because the Court considered that Article 82(2)(d) did not require readily available documents to be attached to the declaration.

53. In the present case, the Maldives Declaration does not comply in substance with the requirement in Article 82(1) concerning the authentication of the signature of the Agent.

54. The Maldives argues that the text of the Maldives Declaration itself identifies H.E. Mr Ibrahim Riffath, Attorney-General of the Maldives, as the Agent of the Maldives.[52] However, as H.E. Mr Ibrahim Riffath himself signed the Maldives Declaration without the requisite authentication, a statement in the text of that document can hardly amount to compliance in substance with the authentication requirement in Article 82(1) of the Rules of Court.

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50 See Maldives Observations, para. 18.

51 *Ukraine v. Russia* Order, para. 39.

52 Maldives Observations, para. 19.

55. The Maldives further argues that the Maldives Declaration was filed with the Court by Mr Mohamed Shaffau Ibrahim, the First Secretary at the Embassy of the Maldives to the Kingdom of the Netherlands (in Brussels, Belgium), and that the position of the First Secretary had been identified to the Court in advance of the filing.[53]

56. This also did not amount to compliance in substance with Article 82(1) of the Rules of Court. From the Maldives Observations, the following is apparent.

57. On 8 and 13 November 2023, a Senior State Counsel in the Attorney-General's Office of the Maldives informed the Court by e-mail that H.E. Mr Ibrahim Riffath, Attorney-General of the Maldives, would be the Agent of the Maldives in relation to a foreshadowed declaration of intervention under Article 63 of the Statute, and that Mr Mohamed Shaffau Ibrahim, First Secretary at the Embassy of the Maldives in Brussels, would, as representative of the Agent, attend a meeting with the Registrar to file the declaration of intervention.

58. However, the Senior State Counsel in the Attorney-General's Office was not a relevant diplomatic representative of the Maldives nor a competent authority in the foreign ministry of the Maldives, within the meaning of the second sentence of Article 38(3) of the Rules of Court. The Senior State counsel was therefore not capable of authenticating the signature of the Agent, nor of authenticating any signature of Mr Mohamed Shaffau Ibrahim as the representative of the Agent.

59. The fact that Mr Mohamed Shaffau Ibrahim, First Secretary at the Embassy of the Maldives in Brussels, delivered the declaration of intervention to the Court does not mean that Article 38(3) of the Rules of Court has been complied with in substance. The mere physical delivery of a document to the Court by a person cannot of itself be taken to be an implied formal authentication by that person of the signature appearing on that document.

60. Furthermore, and in any event, the First Secretary at the Embassy of the Maldives was not capable of providing the required authentication of the Agent's signature. Article 38(3) of the Rules of Court refers to "*the* diplomatic representative" of a State, and not to "*a* diplomatic representative". A good faith interpretation of the ordinary meaning of the words used, in their context and in the light of their object and purpose, requires that they be understood as meaning the head of the diplomatic mission of the State concerned in the country where the Court has its seat, or in that person's absence, its *chargé d'affaires*. The Maldives acknowledges that Mr Ibrahim was not the Ambassador of the Maldives to the Netherlands.[54]

61. The Maldives argues that this non-compliance has now been remedied, in that H.E. Mr Moosa Zameer, Foreign Minister of the Maldives, in a letter to the Court dated 11 February 2024, has confirmed that the signature on the declaration of intervention was that of the appointed Agent. However, the wording of the first sentence of Article 82(1) of the Rules of Court requires the signature on the declaration of intervention to be authenticated in the prescribed manner *at the time that it is filed with the Court*. If

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53 *Ibid.*

54 Maldives Declaration, para. 19.

the signature is not so authenticated at the time that the declaration is filed with the Court, then the requirements of Article 82(1) of the Rules of Court are not satisfied, and the declaration of intervention is inadmissible. Such an inadmissible declaration of intervention cannot become retrospectively admissible as a result of action taken only after an objection to admissibility has been made by one of the parties.[55]

2. The Maldives Declaration does not comply with Article 82(2)(c) of the Rules of Court

62. Article 82(2)(c) of the Rules of Court requires a declaration of intervention to contain "a statement of the construction of [the] provisions [of the convention] for which it contends".

63. That requirement will not be satisfied by wording which merely speaks generally about the importance of particular provisions, or their drafting history, or the principles of interpretation that should be applied to their construction, or case law in which the provisions have been referred to, and so forth. Rather, Article 82(2)(c) of the Rules of Court requires a declaration of intervention to articulate clearly the specific construction of identified provision(s) of the convention for which the proposed intervener contends.

64. This requirement is fundamental. If a declaration of intervention is found to be admissible, the intervener will, after being furnished with copies of the pleadings, be entitled subsequently to submit its substantive written observations on the subject-matter of the intervention (Article 86(1) of the Rules of Court), and to submit observations in the oral proceedings with respect to the subject-matter of the intervention (Article 86(2) of the Rules of Court). These subsequent written and oral observations must be strictly confined to arguments in support of the specific construction of the relevant provisions of the convention that was previously articulated in the prior declaration of intervention which the Court found to be admissible. An intervener cannot in its substantive written and oral observations under Article 86(1) and (2) of the Rules of Court contend for new or different constructions of provisions of the convention, that were not previously set out in its declaration of intervention. It is the statement of construction of provisions of the convention contained in the declaration of intervention (pursuant to Article 82(2)(c) of the Rules of Court) that defines the "subject-matter of the intervention" for purposes of Article 86(1) and (2) of the Rules of Court. If the intervention is admitted, the observations of the intervening State under Article 86(1) and (2) of the Rules of Court must be strictly confined to that subject-matter.

65. If no specific construction of provisions of the convention is articulated in the declaration of intervention, then it will not be possible to determine whether the proposed intervention relates to a question of construction that is actually in question in the proceedings. Nor, if the intervention were to be admitted, would it subsequently be possible to determine whether substantive written and oral observations under Article 86(1) and (2) of the Rules of Court contend for the same construction that was articulated in the declaration of intervention.

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[55] See, e.g., *Legality of Use of Force (Serbia and Montenegro v. Netherlands), Preliminary Objections, Judgment, I.C.J. Reports 2004*, pp. 1041-1042, paras. 77-78.

66. Indeed, if no specific construction of provisions of the convention is articulated in the declaration of intervention, then the proposed intervener may not in fact be contending for any particular construction of provisions of the convention at all. If so, the declaration of intervention will for this reason alone fail to comply with Article 82(2)(c) of the Rules of Court.

67. Furthermore, if no specific construction of provisions of the convention is articulated in the declaration of intervention, it will not be possible to determine whether any construction to be contended for by the intervener is consistent with or in opposition to the construction contended for by either or both parties, or any construction adopted by the Court in any previous case, or any construction contended for by the proposed intervener in any previous case to which that State was a party or in which that State previously intervened. If the construction to be contended for by a proposed intervener is inconsistent with the construction adopted by the Court in a previous case, or a construction contended for by the same State in another case, this should be clear to the Court and the parties at the time that the declaration of intervention is filed since, apart from anything else, this could potentially be relevant to the admissibility of the proposed intervention.

68. A declaration of intervention under Article 63 of the Statute that contains no clear statement of the construction contended for must therefore be inadmissible.

69. The Maldives Declaration does not comply with this requirement. It does not contain clear statements of the particular construction of each of the relevant provisions for which the Maldives is contending. It is also not possible to discern from the wording of the Maldives Declaration any implied articulation of any specific constructions.

70. **Paragraphs 27-32 of the Maldives Declaration** deal with Article I of the Genocide Convention, which states that:

> The Contracting Parties… undertake … to punish [genocide].

From a reading of these paragraphs of the Maldives Declaration, the only apparently discernible construction of that provision for which the Maldives contends is that it imposes a distinct obligation on Contracting Parties to punish genocide.

71. **Paragraphs 33-38 of the Maldives Declaration** deal with Article IV of the Genocide Convention, which provides that:

> Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

From a reading of these paragraphs of the Maldives Declaration, the only apparently discernible construction of that provision for which the Maldives contends is that it means what it says.

72. **Paragraphs 39-46 of the Maldives Declaration** deal with Article V of the Genocide Convention, which states that:

> The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

From a reading of these paragraphs of the Maldives Declaration, the only apparently discernible construction of that provision for which the Maldives contends consists of the very general propositions that penalties may differ amongst States, that it is not in the discretion of States as to whether or not to impose any criminal penalties at all, that penalties prescribed by such legislation must be sufficiently severe to deter potential perpetrators and to reflect the gravity of the offence, and that penalties cannot be circumvented through the grant of amnesties or pardons.

73. **Paragraphs 47-60 of the Maldives Declaration** deal with Article VI of the Genocide Convention, which provides that:

> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

From a reading of these paragraphs of the Maldives Declaration, the only apparently discernible construction of that provision for which the Maldives contends consists of the very general propositions that this provision imposes a duty on the territorial State to conduct prompt, thorough, independent and impartial investigations with a view to assessing whether a charge is to be brought, and to issue charges without delay whenever and as soon as an independent and impartial investigation uncovers credible evidence that a person has committed genocide or related acts, and to conduct trials that are genuine, independent and impartial and meet internationally recognised fair trial standards.

74. The Maldives Declaration additionally contains certain general statements that a Contracting Party cannot rely on internal laws to justify a failure to comply with the Convention, that they are required to perform their obligations under the Convention in good faith, and that failure to comply with the Convention is an internationally wrongful act.[56] However, these statements do not relate to any question of construction of specific provisions of the Genocide Convention. Rather, these statements relate to aspects of the law of treaties other than treaty interpretation,[57] and to the general law of

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[56] Maldives Declaration, paras. 24, 30, 36, 37, 57.

[57] The rules on treaty interpretation are contained in Articles 31-33 of the Vienna Convention on the Law of Treaties. However, these statements in the Maldives Declaration do not relate to the rules of customary international law reflected in these provisions of the Vienna Convention on the Law of Treaties, but rather to those reflected in its Article 26 ("Every treaty in force is binding upon the parties to it and must

State responsibility for failure to comply with treaty obligations. These statements are inadmissible for the reasons given in paragraph 36(b) above.

75. The Maldives Declaration as a whole is therefore inadmissible due to its failure to contain any clear statement of the construction of provisions of the Genocide Convention for which it contends. Alternatively, to the extent that the Maldives Declaration were to be admitted, the intervention of the Maldives would necessarily be strictly confined to the very general propositions identified in paragraphs 70-73 above.

3. The Court cannot be satisfied that the Maldives Declaration is within the permissible scope of an intervention

76. Paragraphs 1-5, 11-16 and 62-63 of the Maldives Declaration are formal introductory or conclusory paragraphs. Paragraphs 9-10, 17-23 and 61 of the Maldives Declaration address the admissibility of the Maldives Declaration. If the remainder of the Maldives Declaration is found to be inadmissible, there would be no basis for admitting any of these paragraphs.

77. Paragraphs 6 and 8 of the Maldives Declaration make statements about claimed events in Myanmar, about diplomatic statements of the Maldives concerning those claimed events, and about the motives of the States filing the declarations of intervention. These paragraphs go beyond the permissible scope of an intervention under Article 63 of the Statute for the reasons given in paragraph 36 above. The Maldives appears to accept that these paragraphs are irrelevant to the intervention, but then somehow suggests that because they are irrelevant, their inclusion in the declaration of intervention cannot make them inadmissible.[58] That is not correct. In the *Ukraine v. Russia* Order, the Court found that a State's motivation when filing a declaration of intervention is not relevant for purposes of the admissibility of the declaration.[59] However, that does not mean that irrelevant statements in the declaration itself about the State's motivations will be admissible in the intervention.

78. Paragraph 7 of the Maldives Declaration makes statements about the *erga omnes partes* character of obligations under the Genocide Convention. This is not a matter in issue at the merits stage of the proceedings. This paragraph goes beyond the permissible scope of an intervention under Article 63 of the Statute for the reasons given in paragraphs 36 to 38 above.

79. Paragraphs 24 to 26 of the Maldives Declaration refer generally to the approach to be taken in relation to the interpretation of the Genocide Convention. If the parts of the Maldives Declaration referred to below are inadmissible, there would be no basis for admitting these paragraphs.

80. Paragraphs 27 to 60 of the Maldives Declaration contain no clear statement of the construction of Articles I, IV, V and VI of the Genocide Convention for which the Maldives contends (see paragraphs 70-73 above). It is therefore impossible to determine that the subject matter of the proposed intervention concerns questions of

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be performed by them in good faith") and Article 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty").

58 Maldives Observations, paras. 26-27.

59 *Ukraine v. Russia* Order, para. 44 final sentence.

construction of the Genocide Convention that are actually in dispute between the parties. These paragraphs are therefore inadmissible for the reasons given in paragraphs 37 and 38 above.

81. Alternatively, if these paragraphs of the Maldives Declaration were to be read as contending for the construction of Articles I, IV, V and VI of the Genocide Convention set out in paragraphs 70-73 above, the statement of construction is at such a high level of generality that it is still impossible to determine that the subject matter of the proposed intervention concerns questions of construction of the Genocide Convention that are actually in dispute between the parties.

82. Myanmar does not hereby make any concessions in the case, and relies fully on what is stated in its Counter-Memorial, and reserves the right to supplement or amend its case during the further course of the proceedings. However, for an intervention under Article 63 of the Statute to be admitted, the Court must be satisfied that that the subject matter of the proposed intervention concerns questions of construction of the Convention that are at the time of the filing of the declaration of intervention actually in dispute between the parties, such that the requirement of admissibility in paragraphs 37 and 38 above is satisfied. If the Court cannot be satisfied of this, or cannot be satisfied that the proposed intervention makes any meaningful contribution to the construction of the particular provisions of the Convention in question, the declaration of intervention cannot be admitted. The text of paragraphs 27 to 60 of the Maldives Declaration do not enable the Court to be so satisfied, and these paragraphs are therefore inadmissible for the reasons given in paragraphs 37 and 38 above.

4. Conclusion

83. The whole of the Maldives Declaration is therefore inadmissible.

F. The Joint Declaration is inadmissible

1. The Joint Declaration does not comply with Article 82(2)(c) of the Rules of Court

84. Like the Maldives Declaration (see paragraphs 62-75 above), the Joint Declaration fails to comply with the requirement in Article 82(2)(c) of the Rules of Court that a declaration of intervention must contain "a statement of the construction of [the] provisions [of the convention] for which it contends".

a. Paragraphs 23-47 of the Joint Declaration

85. These paragraphs of the Joint Declaration all concern Article II of the Genocide Convention, which provides that:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.

86. From a reading of **paragraphs 23-24 of the Joint Declaration**, the only apparently discernible construction of Article II for which they contend is that genocide can be committed by acts other than killings, since paragraph *(a)* of Article II refers to "killing members of the group" while its paragraphs *(b)-(e)* refer to other acts that can constitute genocide.

87. From a reading of **paragraph 25 of the Joint Declaration**, the only apparently discernible construction of Article II for which it contends is that genocide does not require the actual extermination of a group in its entirety but that it only requires the commission of acts enumerated in Article II with the specific intent to destroy the group in whole or in part.

88. From a reading of **paragraphs 26-37 of the Joint Declaration**, the only apparently discernible construction of Article II for which they contend is the very general proposition that acts of sexual and gender-based violence "are capable" of falling within Article II *(a)* of the Genocide Convention if they result in the death of the victim, and "may" or "could" fall within any of paragraphs *(b)* to *(d)*.

89. From a reading of **paragraphs 38-43 of the Joint Declaration,** the only apparently discernible construction of Article II for which they contend is the very general proposition that acts "may" or "could" fall within any of paragraphs *(b)* or *(c)* of Article II if committed against children, even if the same acts would not fall within those provisions if they had been committed against adults.

90. From a reading of **paragraphs 44-47 of the Joint Declaration,** the only apparently discernible construction of Article II for which they contend is the very general

proposition that forced displacement "may, depending on the facts", fall within Article II *(b)* or *(c)* of the Genocide Convention.

b. Paragraphs 48-76 of the Joint Declaration

91. **Paragraphs 48-76 of the Joint Declaration** present arguments as to the standard of proof to be applied by the Court in this case, and as to the kinds of matters that can be regarded as evidence of acts of genocide or of a genocidal intent.

92. The words "or evidences" in the **last sentence of paragraph 28** of the Joint Declaration, and the words "and can constitute evidence of specific intent …" in the **last sentence of paragraph 44** of the Joint Declaration, similarly deal with issues of evidence.

93. These paragraphs of the Joint Declaration invite the Court to revisit and revise its jurisprudence established in the *Bosnia Genocide* case[60] and *Croatia Genocide* case[61] with regard to the standard and methods of proof applied by the Court in cases before it. For instance, paragraphs 50-51 of the Joint Declaration states that:

> [C]ircumstantial evidence will typically be highly significant in drawing inferences of specific intent … [T]he Declarants note that the Court's approach [in the *Bosnia Genocide* case and *Croatia Genocide* case] has prompted mixed reactions among commentators .... The Declarants submit that … it is crucial for the Court to adopt a balanced approach … [to] the threshold for inferring genocidal intent ...

The interveners here argue in effect for a new approach to the standards governing the assessment of circumstantial evidence.

94. However, these paragraphs of the Joint Declaration do not deal with any issue of construction of any provision of the Genocide Convention. Rather, they deal with principles of evidence and procedure in cases before the Court, in particular with principles of evidence and procedure concerning the circumstances in which the Court might draw a particular inference of fact (in this case, the existence of genocidal intent) from circumstantial evidence before it. These paragraphs also address more specifically matters such as the standard of proof,[62] and the weight to be given to particular types of evidence.[63]

95. As was noted in the January 2024 Myanmar Observations, the Genocide Convention does not prescribe any rules of procedure or evidence to be applied by domestic or international courts.

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60 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43 ("***Bosnia Genocide* case").

61 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 3 ("***Croatia Genocide* case").

62 In particular, Joint Declaration, paras. 50-54.

63 Joint Declaration, e.g., paras. 50 ("circumstantial evidence will typically be highly significant") and 64 ("sexual and gender-based violence … can provide compelling evidence").

96. Any international or domestic court dealing with an issue arising under the Genocide Convention will apply its own rules of procedure and evidence. In the *Bosnia Genocide* case and the *Croatia Genocide*, the Court determined the standard of proof that it would apply in accordance with the general principle in its established jurisprudence that "claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive".[64] In both of those cases, the Court indicated[65] that the leading case for this principle is the *Corfu Channel* case, which has nothing to do with the Genocide Convention. In the *Croatia Genocide* case, the Court further elaborated at length how the rules it applied concerning the burden of proof, standard of proof and methods of proof were derived from its general jurisprudence, consisting of cases unrelated to the Genocide Convention.[66]

97. If the Genocide Convention itself prescribed rules of procedure and evidence that had to be applied in cases of alleged breaches of the Convention, then all Contracting Parties would be in breach of the Convention by virtue of the fact that they apply their general domestic law rules of criminal procedure and evidence in genocide cases, rather than rules found in the Convention. That is not the case. The simple fact is that the Genocide Convention does not deal with matters of procedure and evidence.

98. The proposed interveners argue that an intervention under Article 63 of the Statute "may refer to other rules and principles of international law outside the Genocide Convention in so far as these references concern the construction of the Convention's provisions".[67] That is accepted, with emphasis on the words "*in so far as these references concern the construction of the Convention's provisions*". Paragraphs 48-76 of the Joint Declaration do not refer to other provisions of international law as part of an argument concerning *the construction of provisions of the Genocide Convention*. In fact, these paragraphs of the Joint Declaration do not deal with provisions of the Genocide Convention at all. They deal with principles of procedure and evidence in proceedings before the Court.

99. The proposed interveners argue that the Court allowed New Zealand, as intervener under Article 63 of the Statute, to present arguments on similar issues of proof and evidence in the *Whaling in the Antarctic* case.[68] That is not so. In that case, the argument presented by New Zealand directly concerned the construction of Article VIII of the Whaling Convention. According to New Zealand, that provision required that any whaling "for purposes of scientific research" be conducted in such a way that the Contracting State is "able to demonstrate [to other parties] that it has limited the number of whales killed under special permit to the minimum level ...", and that its whaling "viewed objectively, complies with the requirements of Article VIII".[69] That argument was clearly about the content of the obligation imposed by Article VIII of that convention. Contrary to what is claimed in the Joint Observations, the *Whaling in*

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64 *Bosnia Genocide* case, p. 129, para. 209;*Croatia Genocide* case, p. 74, para. 178.

65 *Ibid.*

66 *Croatia Genocide* case, pp. 73-79, paras. 170-199.

67 Joint Observations, para. 23.

68 Joint Observations, paras. 25-30.

69 *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Declaration of Intervention of New Zealand, 20 November 2012, paras. 30-31, https://www.icj-cij.org/sites/default/files/case-related/148/17256.pdf.

the Antarctic case in no way supports a general proposition that "States intervening under Article 63 may offer their view on ... the establishment of a breach, including matters related to the standard of proof and evidence".[70]

100. On the contrary, any questions in proceedings before the Court concerning the rules of procedure, evidence and proof to be applied by the Court when determining whether there has been a breach of a convention do not in general involve the construction of the convention itself. The position would be otherwise only if the convention itself contains provisions that determine or affect matters of procedure, evidence or proof.

101. Consequently, paragraphs 48-76 of the Joint Declaration contain no statement *of a construction of provisions of the Genocide Convention* for which the Joint Declaration contends.

c. Paragraphs 77-80 of the Joint Declaration

102. **Paragraphs 77-80 of the Joint Declaration** purport to deal generally with Articles I to VI of the Genocide Convention. From a reading of these paragraphs of the Joint Declaration, there is no discernible construction of these provisions of the Convention for which the proposed interveners contend, apart from the very general proposition that these provisions, read together, impose an obligation on Contracting Parties to investigate and prosecute persons accused of genocide, and either to punish persons found guilty of genocide following a fair and transparent trial, or to cooperate with international tribunals or to extradite persons accused of genocide for trial in other States.

d. Conclusion

103. Paragraphs 62-69 and 75 above (dealing with the Maldives Declaration) apply *mutatis mutandis* to the Joint Declaration. The Joint Declaration as a whole is inadmissible due to its failure to contain any clear statement of the construction of provisions of the Genocide Convention for which it contends. Alternatively, to the extent that the Maldives Declaration were to be admitted, the intervention of the Maldives would necessarily be strictly confined to the very general propositions identified in paragraphs 86-90 and 102 above.

2. The Court cannot be satisfied that the Joint Declaration is within the permissible scope of an intervention

104. Paragraphs 1-8, 11 and 20 of the Joint Declaration are formal introductory or conclusory paragraphs. Paragraphs 12-19 of the Joint Declaration address the admissibility of the Joint Declaration. Paragraphs 21-22 of the Joint Declaration refer generally to the approach to be taken in relation to the interpretation of the Genocide Convention. If the remainder of the Joint Declaration is found to be inadmissible, there would be no basis for admitting any of these paragraphs.

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70 Joint Observations, para. 29.

105. Paragraphs 9, 10 and 14 (first sentence) of the Joint Declaration make statements about the *erga omnes partes* character of obligations under the Genocide Convention. This is not a matter in issue at the merits stage of the proceedings (see paragraph 78 above). These paragraphs therefore go beyond the permissible scope of an intervention under Article 63 of the Statute for the reasons given in paragraphs 36 to 38 above.

106. Paragraph 27 of the Joint Declaration contains an assertion of fact that "Sexual violence is often a cornerstone of genocidal campaigns because ..." This statement is inadmissible for the reasons given in paragraph 36 above, namely that it makes a positive statement of an alleged fact. It may be within the permissible scope of a intervention to argue that a certain kind of act can as a matter of law fall within the scope of a particular provision of a convention. However, it goes beyond the permissible scope of such an intervention to contend as a fact that a particular type of act occurs frequently in practice.

107. As to paragraphs 23-80 of the Joint Declaration, paragraphs 80-82 above (dealing with the Maldives Declaration) apply *mutatis mutandis* to the Joint Declaration. These paragraphs of the Joint Declaration contain no clear statement of the construction of Articles I to VI of the Genocide Convention for which the proposed interveners contend (see paragraphs 84-103 above). It is therefore impossible to determine that the subject matter of the proposed intervention concerns questions of construction of the Genocide Convention that are actually in dispute between the parties. These paragraphs are therefore inadmissible for the reasons given in paragraphs 37 and 38 above.

108. Alternatively, if these paragraphs of the Joint Declaration were to be read as contending for the construction of Articles I to VI of the Genocide Convention set out in paragraphs 86-90 and 102 above, the statement of construction is at such a high level of generality that it is still impossible to determine that the subject matter of the proposed intervention concerns questions of construction of the Genocide Convention that are actually in dispute between the parties.

3. Conclusion

109. The whole of the Joint Declaration is therefore inadmissible.

G. Other matters

110. Myanmar does not concede that any of the arguments concerning the Genocide Convention contained within either declaration of intervention would be relevant to the Court's decision in this particular case if the interventions were admitted.

111. Myanmar does not consider itself called upon at this stage, before any decision has been taken as to the admissibility of the declarations of intervention, to respond to any substantive arguments that they make. Myanmar fully reserves its right to so respond at the appropriate time, should the Court find the declarations of intervention to be admissible.

H. Submission

112. For the reasons set out above, the Republic of the Union of Myanmar requests the Court to decide that the Maldives Declaration and the Joint Declaration are inadmissible.

H.E. U Ko Ko Hlaing

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of the Republic of the Union of Myanmar

Agent of Myanmar